Filed 12/18/20 In re Ahmed CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re SAIYEZ AHMED, on Habeas Corpus.	A160342 (Contra Costa County Super. Ct. No. 05-171977-2)

In 1998, a jury convicted petitioner of false imprisonment (Pen. Code § 236),[1] a lesser included offense of kidnapping, and second degree robbery (§ 211). It acquitted him of attempted murder and of kidnapping. Petitioner Saiyez Ahmed moved for a new trial under section 1181, subdivision (6) (section 1181(6)) on the ground that the verdict on the robbery count was contrary to the law and the evidence. The trial court denied the motion.

In this habeas proceeding, Ahmed challenges that ruling, contending that the trial court applied the wrong legal standard in denying the motion. Recognizing that his failure to raise this argument on his direct appeal from the judgment resulted in a waiver of the issue, he contends his appellate counsel provided ineffective assistance by failing to raise the issue. We reject Ahmed's claim because the record does not demonstrate error by the trial court that his appellate counsel failed to raise.

[1] Section references are to the Penal Code.

BACKGROUND

The parties are familiar with the facts proven at trial, which are described by our opinion affirming Ahmed's conviction on direct appeal. We summarize them very briefly here insofar as they relate to Ahmed's ineffective assistance claim.

After a verbal altercation and fistfight between Ahmed's co-defendant, Sam Henry Vaughn, Jr. and Shawn McElmore, a stranger, in front of a 7-11 store in San Pablo, McElmore ran off. Ahmed and Vaughn then enticed or forced McElmore's girlfriend, Sherry Johnson, into their car and drove around looking for McElmore, intending to resume the fight. Eventually they ended up at the home McElmore shared with Johnson and their three children. There, they found McElmore holding a sawed-off shotgun. Vaughn charged at McElmore, seized the gun from him and bludgeoned him in the face and head with it, causing serious and extensive injuries. Vaughn and Ahmed then left the scene, apparently taking the gun with them. Ahmed and Vaughn were each convicted of robbery (Ahmed on an aiding and abetting theory), for taking the gun from McElmore by means of force or fear.

Vaughn testified at the trial; Ahmed did not. The prosecution called Johnson and a physician, each of whom contradicted some of Vaughn's testimony.

After Vaughn and Ahmed were convicted, Ahmed filed a motion for new trial on the robbery count. In his written points and authorities, he argued that in ruling on such a motion, "the trial court is required to independently review and weigh the evidence" and that it "takes on the role of the '13th juror.' " He further argued that two of five elements of robbery were not supported by sufficient evidence—"whether there was a 'felonious taking' and whether there was sufficient evidence that the intent to steal arose before or

during the application of force rather than after." According to Ahmed, the evidence showed only that Vaughn fought with McElmore out of "fear, anger and revenge," reasons, Ahmed contended, that were " 'wholly unrelated to larceny,' " that Vaughn took the shotgun after rendering McElmore unconscious, "and then only out of concern that Mr. McElmore not have the shotgun," and that Vaughn then returned to the car, and they drove to Ahmed's home, after which Vaughn "drove off and disposed of the shotgun." Ahmed argued in the alternative that even if the evidence were sufficient to convict Vaughn of robbery, there was no evidence that Ahmed "had knowledge of any 'unlawful purpose,' had the intent or purpose to commit, facilitate or encourage the robbery, or that he acted, adviced [*sic*], aided, promoted, encouraged or instigated the commission of the robbery."

The trial court, stating it had "read and considered the points and authorities both for and against" the motion, heard argument from both parties and denied the motion.

Ahmed and Vaughn appealed. Ahmed raised multiple issues, including a *Batson*/*Wheeler* challenge, challenges to three different jury instructions, and an Eighth Amendment challenge to the life sentence imposed on him for the false imprisonment conviction. In July 2001, we affirmed the judgment in an unpublished decision. (*People v. Ahmed* (July 31, 2001, A086081) [nonpub. opn.].)

Fourteen years after we affirmed Ahmed's conviction, he filed a petition for habeas corpus in propria persona, challenging his sentence on the ground that it was based on multiple strike convictions resulting from a single criminal act. We denied that petition without opinion. (*In re Ahmed* (Mar. 18, 2016, A146784).)

Three years later, in 2018, Ahmed filed the instant petition, initially in propria persona, after first seeking, and being denied, relief in the superior court. Initially, he argued that he was entitled to the recall of his sentence and resentencing under the Three Strikes Reform Act. We appointed counsel to represent Ahmed and permitted counsel to file a supplemental petition. The supplemental petition raised additional issues, including the claim of ineffective assistance of appellate counsel for that counsel's failure to argue that the trial court applied the wrong standard in ruling on the new trial motion. His appellate counsel stated in a supporting declaration that he had read a draft of the supplemental petition and "did not assign as error the trial court's denial of Ahmed's motion for new trial on his robbery conviction because I did not identify any arguable issue to raise in relation to that denial. Specifically, it did not occur to me that the court may have used the wrong standard in reviewing that motion. Had I identified the court's use of the wrong standard in denying that motion as having arguable merit and providing a colorable basis for relief from the judgment, I would have raised that issue. It appears to me now that the trial court's use of the wrong standard in deciding that appeal was an arguable issue at the time of Ahmed's direct appeal, and I am unable at this point to offer a reasonable basis for my failure to raise that error as a basis for appeal." On our own motion, we bifurcated this supplemental petition issue for separate consideration and issued a separate order to show cause regarding it.

In June 2020, we issued our opinion granting Ahmed's petition for habeas corpus on the sentencing issues, remanding the case for correction of the minutes regarding resentencing on the robbery count and directing that Ahmed be permitted to apply for resentencing under the Three Strikes Reform Act. (*In re Ahmed* (June 26, 2020, A153246 [nonpub. opn.].) In this

opinion, we address the ineffective assistance of counsel claim that Ahmed raised in his supplemental petition.

DISCUSSION

Ahmed's ineffective assistance of counsel claim rests on the premise that the trial court applied "the wrong standard" in denying his motion for a new trial on the robbery count. He contends his appellate counsel failed to raise this error on appeal, rendering his appellate representation of Ahmed "deficient." We disagree that the trial court erred and conclude Ahmed's ineffective assistance claim, therefore, has no merit.

" 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' " (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) Second, he "must . . . establish prejudice." (*Id.* at p. 217.)

" 'We assess the reasonableness of counsel's performance deferentially. [Citations.] We consider counsel's performance from his perspective, analyzing counsel's decisions based on what he knew or should have known at the time. [Citations.]' (*In re Thomas* (2006) 37 Cal.4th 1249, 1257.) 'The constitutional standard of performance by counsel is "reasonableness," viewed from counsel's perspective at the time of his challenged act or omission.' " (*In re Richardson* (2011) 196 Cal.App.4th 647, 661.)

When Ahmed filed his notice of appeal, the leading case on new trial motions brought under section 1181(6), which Ahmed cited in his new trial motion, was *People v. Robarge* (1953) 41 Cal.2d 628 (*Robarge*). (See, e.g., *People v. Davis* (1995) 10 Cal.4th 463, 523-524 (*Davis*) [citing and discussing

Robarge]; *People v. Moreda* (2004) 118 Cal.App.4th 507, 513-514 [relying heavily on *Robarge*]; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1307 [referring to *Robarge* as "the leading case"].) In *Robarge*, the trial court, after reviewing the testimony of the sole witness to identify the defendant, pointed out inconsistencies in his testimony that made the witness " 'awfully hard for the Court . . . to believe' " and observed that another witness who was unable to identify the defendant as the robber "was a much better witness." (*Robarge,* at p. 634.) However, the trial court stated that those issues had been given to the jury and that " 'under the law, [the jurors] [were] the sole judges of credibility of witnesses and the determiners of the facts' " and that " '[i]f there is any evidence upon which they have the right to base their conclusion, this Court is not in a position where it could upset it.' " (*Ibid.*) Other remarks by the trial court indicated it "disbelieved much of" the first witness's testimony "and entertained serious doubts as to the validity of his identification of the defendant, but the court nevertheless indicated at least three times that it was bound by the contrary conclusion of the jury." (*Ibid.*)

The defendant claimed on appeal that the trial court had "misinterpreted its duty and erroneously denied his motion for a new trial solely because it felt bound by the jury's decision on the evidence." (*Robarge, supra,* 41 Cal.2d at p. 633.) Our Supreme Court agreed, holding that "the trial court failed to give defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict." (*Id.* at p. 634.) The court stated, "While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a

whole is sufficient to sustain the verdict. [Citations.] It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.] This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict." (*Id*. at p. 633.)

The *Robarge* court continued, "In passing upon a motion for a new trial the judge has very broad discretion and is not bound by conflicts in the evidence, and reviewing courts are reluctant to interfere with a decision granting or denying such a motion unless there is a clear showing of an abuse of discretion." (*Robarge, supra*, 41 Cal.2d at p. 633.) Our Supreme Court subsequently explained further in *Davis* that "there is a strong presumption that [the trial court] properly exercised that discretion" and " ' "its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*Davis*, *supra*, 10 Cal.4th at p. 524.)

In short, the *Robarge* court describes the trial court's role as "supervisory" and specifically directs it, on a motion for new trial, to "consider the probative force of the evidence and *satisfy itself that the evidence as a whole is sufficient to sustain the verdict*." (*Robarge*, *supra*, 41 Cal.2d at p. 633, italics added.) The trial court "is guided by a presumption in favor of the correctness of the verdict and proceedings supporting it" (*Davis*, *supra*, 10 Cal.4th at p. 524) but "has very broad discretion and is not bound by conflicts in the evidence." (*Robarge*, at p. 633.) However, the trial judge's role does not entail ignoring the jury verdict altogether or deciding how the judge would have decided the case if she were sitting as the sole trier of fact.

(See *ibid.* [trial court's independent assessment of the evidence "does not mean . . . that the court should *disregard the verdict* or that it should *decide what result it would have reached if the case had been tried without a jury*, but instead that it should consider the proper weight to be accorded to the evidence and then *decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict*," italics added]; see *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1221 [affirming denial of new trial motion despite trial judge's statement that he had reasonable doubt as to defendant's intent and would not have found defendant guilty had there been a court trial]; *People v. Taylor* (1993) 19 Cal.App.4th 836, 848, 849 (*Taylor*) [reversing trial court decision granting new trial where "the trial court simply decided what result it would have reached if the case had been tried without a jury"][2]; *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 414 [trial court properly declined to substitute its judgment for that of the jury where the court "implicitly found there was sufficient credible evidence to support the verdict, and that the jury was reasonable in believing the witnesses it apparently had believed in reaching the verdict"].)

Applying the teachings of these cases to Ahmed's ineffective assistance claim, we conclude that his claim fails because he has neither shown a clear and unmistakable abuse of discretion by the trial court in denying Ahmed's new trial motion nor that his appellate counsel's representation "fell below an objective standard of reasonableness."

In arguing that the trial court applied the wrong standard to his new trial motion, Ahmed points to the trial court's rejection of the idea that its

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[2] *Taylor* has since been criticized, but not prior to the trial court's decision in this case. (See *People v. Dickens* (2005) 130 Cal.App.4th 1245, 1253.)

role was to sit "as a 13th juror," which description the court described was "disfavored." Ahmed equates the 13th juror standard to the requirement that the trial court "independently review and weigh the evidence to determine whether it was contrary to the jury's verdict" and suggests the trial court's rejection of that standard means it declined to independently review and weigh the evidence. Ahmed is incorrect.

In rejecting Ahmed's new trial motion in 1998, the trial court correctly described the 13th juror characterization as "disfavored" at that time.[3] The *Robarge* court had criticized the trial judge's statement "that 'the Court sits as a thirteenth juror,' " noting that phrase had "an unfortunate connotation," was "misleading," and did not "properly describe the function of the trial judge in passing upon a motion for a new trial. . . . [I]t is the province of the trial judge to see that the jury intelligently and justly performs its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict." (*Robarge*, *supra*, 41 Cal.2d at pp. 633-634.)

Indeed, well before the trial court heard Ahmed's new trial motion, this court also expressed the view that the "13th juror" characterization

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[3] A later Supreme Court decision clarified (and arguably modified) the *Robarge* standard, stating, "[t]he court extends no evidentiary deference in ruling on a[] [section] 1181(6) motion for a new trial" and "[i]f the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is 'contrary to the . . . evidence.' " (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133 (*Porter*).) But in evaluating whether the failure to raise a claim of error in the trial court's new trial ruling on appeal fell below the standard of reasonable counsel, we must view that decision " 'from counsel's perspective at the time of his challenged act or omission.' " (*In re Richardson*, *supra*, 196 Cal.App.4th at p. 661.)

inaccurately described the trial court's duty on a section 1181(6) motion.[4] The characterization had been used to describe a situation in which the trial court orders a new trial merely because the court, "as a '13th juror,' would have decided it differently from the other 12 jurors." (See *Veitch*, *supra*, 128 Cal.App.3d at p. 467; *Hudson v. Louisiana*, *supra*, 450 U.S. at p. 44.) That was not the standard for new trial motions under section 1181(6) in 1998. (See *Robarge*, *supra*, 41 Cal.2d at p. 633 [court should not disregard verdict "*or . . . decide what result it would have reached if the case had been tried without a jury*," italics added].) In short, the trial court's rejection of the 13th juror standard in ruling on Ahmed's new trial motion indicates it was familiar with the approach taken in cases such as *Robarge* and *Veitch* and not that it misunderstood its role.[5]

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[4] In *People v. Veitch* (1982) 128 Cal.App.3d 460, 467-468 (*Veitch*), this court noted that the "13th juror" language had been used by the United States Supreme Court in *Hudson v. Louisiana* (1981) 450 U.S. 40 to distinguish between a motion for acquittal where the evidence is "insufficient as a matter of law" and a motion for new trial in which a trial court has discretion and independently weighs the evidence. Citing *Robarge*, we observed that "[t]he use of the term '13th juror' is unfortunate, for it tends to obscure the trial judge's role more than it clarifies it," and that "California courts have rejected the use of the term to describe the trial judge's role in considering a section 1181, subdivision 6 motion." (*Veitch,* at p. 467.) However, we also stated, "it is clear that the California trial judge acts as a ' "13th juror" ' as the term is used by the United States Supreme Court in *Hudson*, since the trial judge independently weighs the evidence, rather than applying the substantial evidence rule and determining legal sufficiency." (*Id.* at pp. 467-468.)

[5] We note that our high court has not been entirely consistent in its attitude toward the "13th juror" characterization when describing the trial court's role in deciding a new trial motion. (See, e.g., *Porter*, *supra*, 47 Cal.4th at p. 133 [trial judge "sits, in effect, as a '13th juror' "]; *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn.6 [citing *Veitch*, *supra*, 128 Cal.App.3d at pp. 467-468]; *People v. Trevino* (1985) 39 Cal.3d 667, 694,

Ahmed also argues the trial court improperly deferred to the jury rather than independently weighing the evidence based on the court's statements that the evidence was sufficient to support the jury's conclusion even if the court might have reached a different conclusion. In essence, Ahmed contends, the court applied the standard that governs a motion for acquittal under section 1118.1 rather than exercise its independent review of the evidence to determine whether it substantially supported the verdict under section 1181(6).

Unlike the standard for a new trial under section 1181(6), the standard for deciding a section 1118.1 motion is the same as the one appellate courts apply in reviewing appellate claims that the evidence is insufficient to support the verdict: " ' " 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' " ' " (*People v. Gomez* (2018) 6 Cal.5th 243, 307.) The question is a legal one, and the court defers to the jury on the credibility of witnesses and evidentiary conflicts. (*Id.* at p. 309.) As we have discussed, by contrast, on a new trial motion under section 1181(6), the trial court independently reviews the evidence, independently considers its credibility and probative force and then determines whether the evidence as a whole supports the verdict. (*Robarge*, *supra*, 41 Cal.2d at p. 633.)

We disagree with Ahmed that the trial court's statements that the evidence was sufficient to support the jury's conclusion indicate the court

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fn. 29 (*People v. Trevino*) ["The trial court's role is essentially that of the '13th juror' [citing *Robarge*], except insofar as it concludes that the evidence is insufficient to support the verdict"], disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1221.)

mistook the standard governing section 1181(6) motions for a new trial for the standard governing section 1118.1 motions for acquittal or that it was unaware of its duty to independently review and consider the evidence. Ahmed focuses on two statements by the court. After noting that the jury had found there was sufficient evidence to show the intent to rob McElmore, the court stated, "*I think there is sufficient evidence* for the jury to have reached that conclusion and whether or not I would have reached that conclusion beyond a reasonable doubt is not the criteria for the Court's decision." (Italics added.) The court also said it was not appropriate "to substitute the Court's take on things, or view of the evidence, for the jury, *unless there is an absence of support for the conviction on a particular charge*." (Italics added.) These statements, while perhaps less than pellucid, are not inconsistent with the *Robarge* standard.

Most importantly, the court's statements do not contradict the rule that the trial court should "consider the proper weight to be accorded to the evidence" and decide "whether or not, in its opinion, there [was] sufficient credible evidence to support the verdict." (See *Robarge, supra,* 41 Cal.2d at p. 633.) The trial court's most problematic statement in this regard is its assertion that it should not "substitute [its own] take on things, or view of the evidence, for the jury." Had that statement been made without qualification, it would be an inaccurate statement of the standard. But the assertion was followed immediately by the caveat "*unless there is an absence of support for the conviction on a particular charge*." (Italics added.)[6] With this caveat, we

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[6] The arguable ambiguity in the trial court's statements may be explained by the fact that the standard set forth in *Robarge* and other cases is not easy to explain or apply. As our colleagues in the Fourth Appellate District have observed, "Our Supreme Court created a dilemma by stating on the one hand that the trial court must 'consider the proper weight to be

cannot assume the court mistook its function to determine for itself whether there was such support. (Cf. *People v. Risenhoover* (1968) 70 Cal.2d 39, 58 [trial court's "conclusion that 'Under these circumstances, it is not for one man to substitute his judgment for twelve,' in the light of the entire remarks, may reasonably be interpreted as meaning that he would not put his judgment in place of the jury's because his final judgment was the same as that of the jury"].)

The arguable ambiguity of the trial court's statements is resolved by the numerous indications in the record that the court correctly understood its role. The court's own references to the record make clear its familiarity with the evidence at trial, as does its statement about its own assessment that the evidence on the robbery count was relatively weak ("probably by far the weakest count of all of them"). Further, after describing the jury's conclusions, the court framed its conclusion in words that recognize its independent role: "And *I believe* that there is sufficient evidence to support the conviction, based on the testimony" and "*I think* there is sufficient

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accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict,' and on the other that the court should not 'disregard the verdict' or 'decide what result it would have reached if the case had been tried without a jury.' (*Robarge, supra,* 41 Cal.2d at p. 633; see also *People v. Davis, supra,* 10 Cal.4th at pp. 523-524 [trial court's exercise of discretion must be 'guided' by presumption that verdict is correct].) It is conceptually difficult both to give deference to the jury's verdict and to independently determine whether the verdict is supported by sufficient credible evidence and overrule the verdict if it is not supported by such evidence." (*People v. Dickens*, *supra*, 130 Cal.App.4th at p. 1252, fn. 3.) The line between affording deference to the jury verdict and independently reviewing the credibility and probative value of the evidence is somewhat of a tightrope.

evidence for the jury to have reached that conclusion [that there was sufficient evidence to show the intent]." (Italics added.)

Another such indication is the trial court's attention to Ahmed's briefing in support of his new trial motion. That brief explained that the standard on a new trial motion under section 1181(6) is distinct from the standard that applies to a motion for acquittal under section 1118.1 and argued that "[i]n ruling on a motion for a new trial, the trial court is required to independently review and weigh the evidence." Ahmed cited *People v. Serrato* (1973) 9 Cal.3d 753, 761 [noting difference in standards and stating "[i]n ruling upon a motion for a new trial, the trial court is required to independently weigh the evidence"][7] and *People v. Trevino*, *supra*, 39 Cal.3d at p. 694 ["trial courts *do not* employ the same standard as reviewing courts do in weighing the sufficiency of the evidence on a section 1181 motion for a new trial"].[8]

The trial court twice stated on the record that it had "read [or reviewed] and considered the points and authorities" submitted by both sides. It mentioned and disagreed with Ahmed's reference to the "13th juror" standard, which as we have said, shows the court was familiar with the approach of cases such as *Robarge*, which Ahmed also cited in his motion. However, it did not take issue with anything else in Ahmed's brief, including the assertions that the court was required to "independently review and weigh the evidence" and that its role in ruling on the section 1181(6) motion was different from the "substantial evidence" review applied under

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[7] *People v. Serrato* was disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn.1.

[8] *People v. Trevino* was disapproved on other grounds in *People v. Johnson*, *supra*, 47 Cal.3d at pp. 1219-1221.

section 1118.1. In short, the trial court plainly read the parties' briefs, and it is reasonable to infer that it understood from Ahmed's brief and the cases cited in it that its duty was to consider the weight or probative value of the evidence and to decide whether in its opinion there was sufficient credible evidence to support the jury's conviction on the robbery count. (*People v. Risenhoover*, *supra*, 70 Cal.2d at p. 58 ["Since the court reviewed defendant's authorities, it cannot be assumed that when it stated that it felt its function was to assure a fair trial to the parties in specified particulars, it meant that it believed its function was limited to those particulars"].)

Another indication that the court closely considered the evidence is that it pointed out the issue of fact it viewed as central: "the real issue was whether the intent [to take the gun] had arisen prior to the taking." After observing that the jury had received specific instructions "that the intent must precede the taking" and had found that it did, the court framed its conclusion this way: "*I believe that there is sufficient evidence* to support the conviction, *based on the testimony*" and "*I think there is sufficient evidence* for the jury to have reached that conclusion [that there was sufficient evidence to show the intent] . . . ." (Italics added.)

Ahmed points out that the trial court concluded that there was sufficient credible evidence of robbery, notwithstanding its own view, stated at the hearing, that the evidence was "not particularly strong" and the robbery charge was, in its view, "probably by far the weakest count of all of them." He argues this, together with the court's acknowledgement that it "perhaps would have come to a different conclusion," indicates the court improperly deferred to the jury's evaluation of the evidence. We disagree. The court's statement makes sense in light of the record. The only direct evidence regarding defendants' intent in taking the gun was Vaughn's

testimony that he took it and assaulted McElmore and took the gun only to avoid being shot. That testimony evidently was not believed by the jury (who convicted him of attempted voluntary manslaughter). The jury and, likewise, the court had good reason to find that testimony was not credible, since (as the prosecutor reminded the court at the hearing) Vaughn's credibility was undermined when his account of how he inflicted the injuries on McElmore was refuted by the physician who testified about the extent of McElmore's injuries and that they were "completely inconsistent" with Vaughn's account.[9]

Also, evidence supported the conclusion that Ahmed aided Vaughn in taking and disposing of the gun. Johnson testified that when they drove up to the house she and McElmore shared, Ahmed and Vaughn *both* said, "There he is," and that when the car stopped it was clear McElmore was holding a sawed-off shotgun and *both* Vaughn and Ahmed "jumped out of the car and ran towards" McElmore. Vaughn and Ahmed plainly acted together in seeking to find McElmore and continued to do so when they found him. Ahmed may not have physically participated in inflicting the injuries on McElmore, but Johnson's testimony strongly supports the inference that Ahmed witnessed Vaughn's savage attack on McElmore with the gun, and the severity of the injuries suggests Ahmed did not intervene. From Vaughn's bludgeoning of McElmore with the gun and the pool of blood Johnson later found McElmore lying in, one can infer there was "a lot of

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[9] As our opinion describes the evidence, McElmore, who was 32 years old at the time, was taken to the hospital "in such serious condition that he was not expected to live" and, although he survived, "suffered severe, permanent brain damage, and was unable to talk, understand what is said to him, walk, or feed himself. He receives sustenance through a tube inserted into his stomach, sleeps in a protective bed, and no further improvement in his cognitive or motor functioning is anticipated. He will require 24-hour institutional care for the rest of his life."

blood" on the gun when Vaughn took it and, further, that Ahmed saw the bloody gun when Vaughn returned to the car. Having acted in concert with Vaughn all night up to that point, we think it reasonable to conclude that Ahmed continued to do so when he drove Vaughn away from the scene. By acting as the "getaway driver," he assisted Vaughn in taking and getting rid of the gun. The prosecutor reminded the trial court of much of this evidence and argued the inferences that could be drawn from it at the hearing on the new trial motion.

In short, the record of the new trial proceedings does not overcome the "strong presumption that [the trial court] properly exercised [its] discretion" in denying the new trial motion or demonstrate a " ' "manifest and unmistakable abuse of discretion." ' " (*Davis*, *supra*, 10 Cal.4th at p. 524.) While "it would have been preferable for the court to have been more specific, stating it was denying the motion based on its independent weighing of the evidence, its failure to do so and its use of less than artful language cannot be equated with having applied the wrong standard." (*People v. Price* (1992) 4 Cal.App.4th 1272, 1276.)

Because we reject Ahmed's argument that the trial court applied the wrong standard, we have no reason to conclude that Ahmed's appellate counsel's failure to raise such a claim of error on appeal fell below the standard of reasonableness under prevailing professional norms. Appellate counsel's confession in his declaration in support of the current habeas petition that "it did not occur to [him] that the court may have used the wrong standard in reviewing that motion," viewed in light of the law at the time the appeal was pending, does not compel a different conclusion. Nor does his assertion that, having read a draft of the habeas petition prepared by Ahmed's habeas counsel, "[i]t appears to me now that the trial court's use

of the wrong standard in deciding that appeal [*sic*] was an arguable issue at the time of Ahmed's direct appeal." "The mere fact that present counsel has identified some legal claims not previously pressed on appeal or in a prior habeas corpus petition does not necessarily suggest prior counsel was constitutionally ineffective, for we presume such unraised claims exist in all cases." (*In re Reno* (2012) 55 Cal.4th 428, 465.) "[C]ounsel's decision regarding which issues to raise . . . ' "falls within the wide range of reasonable professional assistance" ' [citations] and is entitled to great deference. In short, the omission of a claim, whether tactical or inadvertent, does not of itself demonstrate ineffectiveness unless it was *objectively unreasonable*, meaning that the omitted claim was one that any reasonably competent counsel would have brought." (*Ibid.*) "[C]riminal defendants are guaranteed the right to effective legal representation on appeal, but counsel need not raise all nonfrivolous issues in order to be deemed competent." (*Id.* at p. 494.) "As the high court has stated: 'Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.' (*Jones v. Barnes* (1983) 463 U.S. 745, 751-752.)" (*In re Hampton* (2020) 48 Cal.App.5th 463, 477.)

Because we conclude Ahmed has not shown his counsel was deficient, we need not address whether there was prejudice. We note only that, based on our analysis above, we have serious doubt that there was such prejudice. Given the state of the law on new trial motions when we decided Ahmed's appeal in 2001, it is unlikely this court would have reversed the denial of the new trial motion even if appellate counsel had raised the issue.

DISPOSITION

The ineffective assistance of counsel claim raised in this bifurcated habeas corpus proceeding is denied.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.